A First Principles Approach to Couples' Property in the Conflict of Laws

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This article asks how the conflict of laws should approach couples' property as a matter of first principles, by reference to the law of New Zealand. It argues that lawmakers should make full use of the pluralist potential of general conflict of laws methodology, engaging in an explicit evaluation of the many – often hidden – values that shape its rules. Based on such an evaluation, the article argues that the conflict of laws should strive to facilitate the effective dissolution of personal property relationships and recognise their personal and social ties to legal systems. An internationalist approach, displaying an openness to the exercise of jurisdiction and the application of foreign law, would serve to achieve these aims.

Keywords: Family Law, Couples' Property, Relationship Property, Matrimonial Property, Subject-Matter Jurisdiction, Choice of Law

A. Introduction

When individuals enter into a personal relationship – such as marriage, a civil union or registered partnership, or a de facto relationship – the law must find a way of allocating the property that they own or acquire. It must determine whether the property remains separate or becomes jointly owned, how to divide up the property once the relationship has come to an end, and whether the relationship is of a kind that is covered by the rules so developed. Different legal systems approach these questions in different ways. In today's globalised world, it is increasingly likely that couples will be caught between these different systems. Couples are

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more likely to be of mixed nationality or geographic origin, to live in several countries over the course of their relationship, or to amass property in more than one jurisdiction. When such couples want to ascertain their respective entitlements to property, it is necessary to address the cross-border elements of their claims. Hence, such claims – claims relating to 'couples' property' – are a core concern for any modern system of conflict of laws.[1]

This paper asks how the conflict of laws should approach these claims as a matter of first principles.[2] It does this by reference to the law of New Zealand, for two reasons. The first is that the New Zealand Law Commission is currently reviewing the effectiveness of the conflict of laws rules in the Property (Relationships) Act 1976,[3] so a deeper inquiry into its rules is both necessary and timely. The second reason is that New Zealand, with a conflict of laws system that is unburdened by the goals of the EU project and still coming into its own after decades of reliance on English law, offers a comparative perspective that is particularly insightful. The New Zealand experience encourages us to ask searching questions of the conflict of laws as a discipline, and to reflect on the many different solutions that may be applied to couples' property.

The proposed 'first principles' approach is based on the general conflict of laws methodology applicable in New Zealand. Applying this methodology, and making use of its full pluralist potential, the paper argues that the New Zealand conflict of laws should adopt an 'internationalist' approach to couples' property. It should focus on the couple's proprietary *relationship* (their 'personal property relationship'), rather than the property, and recognise the relationship's personal and social ties to foreign legal systems. New Zealand's current conflict of laws rules on couples' property, on the other hand, are unduly inward focused, giving too

[1] See R Schuz, 'Choice of Law in Relation to Matrimonial Property in the 21st Century' (2019) *Journal of Private International Law* (forthcoming).
[2] Cf *ibid*.
[3] Law Commission, *Dividing Relationship Property – Time for Change?* (NZLC IP41, 2017).

much scope to the law of the forum and, conversely, giving too little scope to the court's subject-matter jurisdiction over foreign domiciliaries and foreign land.

The paper is in four sections. Section B provides an overview of New Zealand's current conflict of laws rules on couples' property. Section C then takes a step back and asks what are the first principles that should apply in reforming the rules? Section D applies these principles to ask what New Zealand's conflict of laws rules on couples' property *should* look like?

B. The Property (Relationships) Act 1976 and its Conflict of Laws Rules

New Zealand has what may be described as a deferred community regime for couples' property.[4] The Property (Relationships) Act 1976 (PRA) provides that property acquired in the course of a relationship, as well as the family home and chattels, are generally to be treated as 'relationship property'; and that, barring extraordinary circumstances, all relationship property is to be divided equally between the partners upon separation.[5] This regime applies equally to couples in a marriage, civil union or de facto relationship, which sets it apart from many of the regimes applicable in other countries.

New Zealand's conflict of laws rules on couples' property are largely codified in ss 7 and 7A of the Act. The purpose of this Section is to analyse the rules (rather than critique them). It provides a brief overview of ss 7 and 7A (Pt 1), before turning to consider their scope of application (Pt 2) and whether there is residual subject-matter jurisdiction outside of the PRA (Pt 3).

1. *Sections 7 and 7A in brief*

[4] See A Angelo and W Atkin, 'A Conceptual and Structural Overview of the Matrimonial Property Act 1976' (1977) 7 *New Zealand Universities Law Review* 237.
[5] Property (Relationships) Act 1976, s 11.

The PRA relies on a distinction between movable and immovable property to limit its reach. Section 7 provides that the Act applies to immovable property situated in New Zealand, and to movable property situated in New Zealand *or elsewhere* provided one of the spouses or partners is domiciled in New Zealand.[6] Thus, the Act excludes movable property where neither party is domiciled in New Zealand; and foreign immovables are excluded entirely from the regime.[7] The only exception to this is if the parties have conferred subject-matter jurisdiction on the New Zealand court by agreeing that the PRA is to be applicable.[8] The courts have held that they may not even take account of immovables situated outside New Zealand when dividing up a couple's property under the Act.[9]

Section 7 is a unilateral choice of law rule, which means that it denotes the extent to which New Zealand law applies to cross-border claims. However, s 7A allows parties to contract out of s 7 by agreeing that foreign law is to be applicable.[10]

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[6] Set out in full, s 7 provides:

> **7 Application to movable or immovable property**
>
> (1) This Act applies to immovable property that is situated in New Zealand.
>
> (2) This Act applies to movable property that is situated in New Zealand or elsewhere, if one of the spouses or partners is domiciled in New Zealand—
>
> (a) at the date of an application made under this Act; or
>
> (b) at the date of any agreement between the spouses or partners relating to the division of their property; or
>
> (c) at the date of his or her death.
>
> (3) Despite subsection (2), if any order under this Act is sought against a person who is neither domiciled nor resident in New Zealand, the court may decline to make an order in respect of any movable property that is situated outside New Zealand.

[7] *Walker v Walker* [1983] NZLR 560 (CA); *Samarawickrema v Samarawickrema* [1995] 1 NZLR 14 (CA).

[8] Section 7A(1). The section is not expressed to be subject to limitations.

[9] *Samarawickrema v Samarawickrema* [1995] 1 NZLR 14 (CA). However, the machinery provisions on post-separation conduct may operate so as to provide compensation: *Walker v Walker* [1983] NZLR 560 (CA).

[10] Set out in full, s 7A provides:

> **7A Application where spouses or partners agree**
>
> (1) This Act applies in any case where the spouses or partners agree in writing that it is to apply.
>
> (2) Subject to subsections (1) and (3), this Act does not apply to any relationship property if—
>
> (a) the spouses or partners have agreed, before or at the time their marriage, civil union, or de facto relationship began, that the property law of a country other than New Zealand is to apply to that property; and
>
> (b) the agreement is in writing or is otherwise valid according to the law of that country.
>
> (3) Subsection (2) does not apply if the court determines that the application of the law of the other country under an agreement to which that subsection applies would be contrary to justice or public policy.

2. *Scope of section 7*

Section 7 delimits exhaustively the cross-border application of the Act: the court need not characterise the issue in order to identify the rules of subject-matter jurisdiction and choice of law that, in turn, will determine whether the Act applies. It need not ask, for example, whether a claim brought by a New Zealand-domiciled wife in relation to the couple's movables in England raises a proprietary or restitutionary issue, or whether it deals instead with the property consequences of marriage (and other personal relationships). Section 7 has already done the work. The Act applies to all claims falling within its material scope, provided the connecting factors in section 7 are satisfied.

This also means that the Act applies even if the claim is pleaded as a matter of foreign law.[11] In other words, it is not possible to circumvent section 7 and the PRA by pleading the case as, say, a constructive trust claim under English law (or, for that matter, New Zealand law[12]). The New Zealand-domiciled wife cannot rely on the English law of constructive trusts to claim an interest in movable property in England beneficially owned by her spouse: first, because section 7 provides that the Act applies to movable property if one of the parties is domiciled in New Zealand, and the wife is domiciled in New Zealand; and second, because the claim concerns 'transactions between spouses or partners in respect of property' and so falls within the material scope of the PRA regime.[13]

3. *Residual subject-matter jurisdiction*

The PRA does not confer universal subject-matter jurisdiction – it confers jurisdiction over the heads of property specified in section 7(1) and 7(2). It is an open question whether the PRA excludes residual subject-matter jurisdiction under common law conflict of laws rules for

[11] The Act is not merely 'self-limiting': see L Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 15th edn, 2014) ['Dicey, Morris and Collins'] para 1-049.
[12] S 4.
[13] S 4.

claims that fall beyond its reach: claims relating to foreign immovables, and claims relating to movables where neither of the parties is domiciled in New Zealand, in circumstances where the parties have not agreed that the PRA is to be applicable.[14]

For example, the PRA would not apply to the movable property of a couple from Germany who travel to New Zealand, spend a few years in the country without becoming domiciled, and accumulate significant assets during that period. It is unclear what would happen if they nevertheless ask the New Zealand court to determine their respective property rights outside of the PRA regime. Does section 7, by implication, exclude the court's subject-matter jurisdiction to determine a couples' property claim by non-domiciliaries pursuant to laws other than the PRA? Or does section 7 leave intact residual common law rules of subject-matter jurisdiction, so that the claim may be brought to the extent it satisfies those rules?

The Act does not offer any obvious clues. Section 4 provides that the Act operates as a code, excluding claims in common law and equity.[15] But this exclusion is confined to rules and presumptions relating to 'transactions' between the parties, which does not seem to capture conflict of laws rules;[16] and section 7 simply states that the Act applies if the conditions in section 7 are met. It is true that it is undesirable to maintain two sets of conflict of laws rules, requiring claimants to consult both the PRA and common law to determine whether the New Zealand court has jurisdiction.[17] But it would be wrong to draw an inference that, by enacting section 7, Parliament intended to exclude the court's residual subject-matter jurisdiction in circumstances where it may otherwise be the appropriate forum to hear the claim. In the absence of such an intention, the common law rules cannot be considered extinguished. Thus, the better view is that section 7 does not affect jurisdiction over, say, a German claim between

[14] See C McLachlan, 'Matrimonial Property and the Conflict of Laws' (1986) 12 *New Zealand Universities Law Review* 66.
[15] S 4; *Burt v Yiannakis* [2015] NZHC 1174, [2015] NZFLR 739 (HC).
[16] On the argument that s 4 also excludes common law conflict of laws rules, see McLachlan (*supra* n 14) 76.
[17] See further McLachlan (*supra* n 14) 77 ('The common law conflicts rules could not be applied easily in the modern New Zealand statutory context').

non-domiciled but resident spouses in relation to movable property, simply because it is the kind of claim that would have to be brought under the PRA if section 7 were applicable.

If section 7 is not a rule of exclusive subject-matter jurisdiction, the question arises whether common law rules confer jurisdiction over foreign immovables (or whether jurisdiction is limited to movable property). This requires examination of the *Moçambique* rule, which has traditionally excluded subject-matter jurisdiction over claims relating to title in, or possession of, foreign land.[18] More specifically, the issue is whether couples' property claims fall within the *in personam* exception of the rule, which applies if the court is enforcing personal equities between the parties, such as contractual obligations relating to the transfer of foreign land. There is mixed authority on this issue,[19] but in line with the general softening of the *Moçambique* rule,[20] the better view may be that claims relating to couples' property fall within the exception to the rule. Moreover, the rule is unlikely to apply where the parties have entered into a property agreement relating to foreign law.[21]

Finally, it is important to note that a claim that satisfies residual common law rules of subject-matter jurisdiction may still, ultimately, be unavailable if the applicable choice of law rule points to New Zealand law being the governing law. That is because there seems to be no residual jurisdiction *as a matter of New Zealand domestic law* to determine couples' property claims outside of the PRA regime. Section 4 provides that the Act operates as a code, excluding

[18] *The British South Africa Co v The Companhia de Moçambique* [1893] AC 602 (HL).

[19] Asher J in *Burt v Yiannakis* considered that relationship property matters did not ordinarily fall within this exception, taking a narrow view of the exception: *Burt v Yiannakis* [2015] NZHC 1174, [2015] NZFLR 739 (HC), [55]ff, [73], cf [46]-[47] (where his Honour considered that s 7 reflects the well-established principle of private international law that rights to foreign immovables 'would fall for consideration under the lex situs'). Asher J's reasoning does not sit well with Woolford's analysis in *Schumacher v Summergrove Estates Ltd* [2013] NZHC 1387, [17], where his Honour concluded that the Court had subject-matter jurisdiction to declare a constructive trust over foreign land (on appeal, the Court of Appeal did not consider this issue and proceeded on the assumption that there was subject-matter jurisdiction). Moreover, there is overseas common law authority that provides indirect support for the proposition that the exception applies in the couples' property context: *Murakami Takako v Wiryadi Louise Maria (No 2)* [2009] 1 SLR 508 (CA), [36]; see also *Murakami v Wiryadi* [2006] NSWSC 1354, [51].

[20] See *Lucasfilm Ltd v Ainsworth* [2011] UKSC 39, [2012] 1 AC 208, [70].

[21] See Law Commission (*supra* n 3) 790, citing David Goddard, 'Relationship Property Disputes – the International Dimension' (paper presented to the New Zealand Law Society Family Law Conference, October 2003) 383.

claims in common law and equity.[22] So if common law choice of law rules were to point to New Zealand law being applicable, but section 7 excludes application of the PRA, the court appears to lack jurisdiction to entertain a claim based on common law rights or equity.[23] Strictly speaking, this is not a conflicts matter at all but a matter of New Zealand substantive law.[24]

C. Going back to 'first principles' – a question of methodology

The Law Commission's review provides a good opportunity to ask whether New Zealand's conflict of laws rules on couples' property are still fit for purpose. Instead of identifying specific problems with the way the rules have operated, this paper proposes to examine the rules as a matter of first principles. The benefit of a 'first principles' approach is that it enables consideration of all the norms, aims, policies or principles – in short, the full suite of values – that should shape the rules. It forces us to confront existing assumptions behind the rules and provides a basis for comprehensive critique.

The purpose of this Section is to outline the parameters of the proposed 'first principles' approach. Such an examination should take place within the framework of the general conflict of laws, which provides a methodology for devising rules of subject-matter jurisdiction and choice of law (Pt 1). This methodology, in New Zealand's modern system of conflict of laws, requires a value-based, contextual engagement with the rules (Pt 2).

1. *Devising rules of subject-matter jurisdiction and choice of law*

[22] Section 4; *Burt v Yiannakis* [2015] NZHC 1174, [2015] NZFLR 739 (HC).
[23] Cf *Mosaed v Mosaed* [1997] NZFLR 97 (CA) for the proposition that the PRA is not a complete code.
[24] In *Burt v Yiannakis* [2015] NZHC 1174, [2015] NZFLR 739 (HC), for example, Ms Burt claimed an equitable interest in immovable properties in London and submitted that, if an equitable interest in these properties fell outside of the scope of s 7, equitable relief could still be sought in its own right outside of the PRA regime (at [22]). Ms Burt apparently did not plead foreign law (ie English law) as being applicable to such a claim so her claim had to be considered under New Zealand law by default. The High Court rejected the submission. It concluded that s 4, which provides that the PRA operates as a code, functioned as a jurisdictional bar to common law or equitable claims relating to foreign immovables. However the Court was not required to consider whether the position would have been different if Ms Burt's claim was held to be governed by English law.

The conflict of laws serves a number of key functions in resolving cross-border disputes about couples' property. Of particular relevance here are two of these functions: subject-matter jurisdiction and choice of law.

The first, subject-matter jurisdiction, determines whether the court has adjudicatory jurisdiction over matters with foreign elements.[25] Subject-matter jurisdiction may coincide with the scope of the law of the forum. For example, the New Zealand court's subject-matter jurisdiction over the dissolution of marriage coincides with New Zealand's exercise of prescriptive jurisdiction under the Family Proceedings Act 1980,[26] because the court does not apply foreign law to questions of divorce.[27] If New Zealand law (ie the Act) applies, the court has jurisdiction, and vice versa. In this paper, it will be necessary, therefore, to consider whether the New Zealand court's subject-matter jurisdiction over couples' property should be limited (for example, whether it should exclude certain types of property, or whether it should be coextensive with the scope of New Zealand law).

Subject-matter jurisdiction is distinguishable from personal jurisdiction. A court does not have subject-matter jurisdiction over a matter simply because it has personal jurisdiction over the defendant.[28] Subject-matter jurisdiction, in a conflict of laws sense, is also distinguishable from subject-matter jurisdiction in a domestic sense. Thus, a specialised court or tribunal like the Family Court has 'domestic' subject-matter jurisdiction over proceedings relating to family matters, but this does not mean that the High Court's international jurisdiction is similarly confined. For example, the Family Court's jurisdiction over couples' property matters is confined to the scope of the PRA, but this does not mean that the High Court would

[25] See A Briggs, *The Conflict of Laws* (Oxford University Press, 2013) 50; M Hook, 'The statutist trap and subject-matter jurisdiction' (2017) 13 *Journal of Private international Law* 435.
[26] S 37(2).
[27] See *Wilson v Wilson* (1872) LR 2 P & D 435, 441-2; *Le Mesurier v Le Mesurier* [1895] AC 517, 540-1.
[28] FA Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 111 *Recueil des Cours* 1, 146. As to *in personam* claims and personal jurisdiction, see *Dicey, Morris and Collins* (*supra* n 11) Rule 29.

lack international subject-matter jurisdiction to determine a claim that falls outside the scope of the PRA.[29]

If the court does have subject-matter jurisdiction, the second function of the conflict of laws is to identify the law applicable to the matter. Is the matter governed by the law of the forum, or is it subject to a choice of law rule that may lead to the application of foreign law (ie a "multilateral" choice of law rule)? If it is the latter, then what is the applicable connecting factor? The questions of subject-matter and choice of law are often closely interrelated where subject-matter jurisdiction coincides with the scope of the law of the forum.[30] The second principal question in this paper, therefore, will be whether couples' property should be governed exclusively by the law of New Zealand and, if foreign law is applicable in principle, what the relevant connecting factor(s) should be.

2. *Conflicts methodology as a value-based inquiry*

Conflict of laws methodology provides for three consecutive steps to determine its rules on subject-matter jurisdiction and choice of law: the process of characterisation, the identification of subject-matter limitations, and the selection of appropriate connecting factors for the purposes of choice of law. In performing these steps, the conflict of laws balances a range of sometimes competing values.

The first step – the process of characterisation – is crucial in shaping the nature of the inquiry. Characterisation provides the conflict of laws with a language for transcending the bounds of the domestic, in order to identify the best conflict of laws rules for issues that are not confined to any one legal system.[31] In other words, characterisation takes the issue that is in

[29] In relation to *domestic* subject-matter jurisdiction, cf s 4 of the PRA and *Mosaed v Mosaed* [1997] NZFLR 97 (CA) for the proposition that the PRA is not a complete code.
[30] Hook (*supra* n 25).
[31] See, eg, *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579, [2010] 2 Lloyd's Rep 323, [47] for an 'internationalist' approach to characterisation.

dispute and re-frames it from a conflict of laws perspective. This framing provides many of the values that are then used to shape the rules of subject-matter jurisdiction and choice of law.

(a) *Characterisation*

The first task in the process of characterisation is to identify the 'true issue' in a case.[32] Rather than fixating on the particular way an issue is classified according to substantive domestic law, the focus is on the functions of the underlying substantive rules.[33] Rules that are of the same kind should be characterised in the same category, which can then be used to identify subject-matter limitations and the applicable choice of law. The ultimate aim is to identify 'the most appropriate law to govern a particular issue'.[34] While all substantive rules are a product of their underlying legal system, the aim is to rise above formal domestic classifications and adopt a characterisation that transcends the different ways in which legal systems are organised.

Courts have emphasised the need for a pragmatic approach to characterisation, for 'commonsense solutions based on practical considerations'.[35] Another way of looking at this is to say that characterisation requires flexibility, and an openness to whatever considerations may be relevant to a particular issue. This may include considerations relating to the substantive rules in question.[36] So the courts' emphasis on the 'practical' should not be understood narrowly, as an inquiry that discards anything overly aspirational – in the form of social, moral or cultural values, for example – and focuses *solely* on efficiency or predictability or ease of application.

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[32] *Schumacher v Summergrove Estates Ltd* [2014] NZCA 412, [2014] 3 NZLR 599, [36], adopting the English Court of Appeal's approach in *MacMillan Inc v Bishopsgate Investment Trust Plc* [1996] 1 WLR 387 (CA).
[33] *Dicey, Morris & Collins* (*supra* n 11) para 2-039.
[34] *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] QB 825 (CA), [27].
[35] *Schumacher v Summergrove Estates Ltd* [2014] NZCA 412, [2014] 3 NZLR 599, [35], citing *MacMillan Inc v Bishopsgate Investment Trust Plc* [1996] 1 WLR 387 (CA).
[36] For example, one of the reasons the conflict of laws tends to single out issues of formal validity, rather than treating all issues of validity alike, is that the law is often reluctant to strike down bargains on purely 'technical' grounds. By submitting issues of formal validity to a rule of *favor validitatis* (ie favouring the legal systems which will uphold the formal validity of the agreement), the conflict of laws actively increases the chances of the bargain being upheld.

(b) *Relevant values*

Modern conflict of laws recognises that there is a broad and open-ended range of values that may be of relevance to particular conflicts problems: for example, values related to the administration of justice, such as predictability or the speedy, fair, orderly and cost-efficient resolution of disputes;[37] the parties' interests in having a particular law applied, perhaps because they intended it to be applicable;[38] certain regulatory interests of foreign states;[39] concerns relating to cross-border coordination – in particular, whether the court's exercise of jurisdiction would interfere with foreign proceedings, or whether its judgment would be enforceable overseas;[40] and even 'substantive' values, such as the need to offer protection to particular groups of claimants.[41] This is not an exhaustive list of possible considerations.

The broad and open-ended approach is a departure from the closed view of the conflict of laws that treated the discipline as a hard science more than a man-made body of law. The (implicit) goal of this closed view was to *free* the discipline from the need to manage different sets of values. Thus, Savigny's theory of the natural 'seat' assumed, as a matter of fact, that each legal relation has a law to which it 'belongs'.[42] Similarly, the principle of territoriality, which was central to both Story's and Dicey's conceptualisation of the subject,[43] reflected the

[37] See, eg, *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077, 1096-7 ('… the rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner … what must underlie a modern system of private international law are principles of order and fairness, principles that ensure security of transactions with justice.').
[38] See, eg, *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 (PC); *New Zealand Basing Ltd v Brown* [2016] NZCA 525, [2017] 2 NZLR 93, [58] and [65] (reversed on appeal, on the basis of statutory interpretation rather than conflict of laws reasoning).
[39] See, eg, *Ludgater Holdings Ltd v Gerling Australia Insurance Co Pty Ltd* [2010] NZSC 49, [2010] 3 NZLR 713 (relating to a foreign debt).
[40] See, eg, *Ludgater Holdings Ltd v Gerling Australia Insurance Co Pty Ltd* [2010] NZSC 49, [2010] 3 NZLR 713, [29] (that the court is precluded from making an order in relation to foreign assets that would be inconsistent with the foreign insolvency regime); *Schumacher v Summergrove Estates Ltd* [2014] NZCA 412, [2014] 3 NZLR 599, [37] and [42].
[41] See, eg, Credit Contracts and Consumer Finance Act 2003, s 137 (NZ).
[42] See FC von Savigny, *System des heutigen Römischen Rechts* (transl Guthrie, 1869) vol VIII, 89, section 360.
[43] J Story, *Commentaries on the Conflict of Laws* (Little, Brown and Company, 7th edn, 1872) ss 17-18; and AV Dicey, *A Digest of the Law of England* (Stevens and Sons, 2nd edn, 1908) 'Introduction'.

idea that acts were necessarily located in any one jurisdiction, and that they were, therefore, logically connected with that jurisdiction. English courts had intuitively adopted the principle of territoriality when they were first faced with conflicts of laws;[44] and over time, influenced by scholarship, they came to rely more generally on the idea that matters should be governed by the law most closely connected.[45] The principle of close connection seemed to offer a geographical, normatively self-sufficient way of resolving conflicts of laws. Anything that was a matter of public law or policy, on the other hand – matters that were too burdened by social, moral or political values – simply fell outside of the scope of the conflict of laws.[46]

But despite the appearance of neutral self-sufficiency, an inquiry into the 'connection' of relationships to legal systems is necessarily an inquiry into values. The conflict of laws has long recognised that the idea of territoriality is only a means to an end, and that connecting factors should, where appropriate, advance comity, meet the parties' reasonable expectations and produce predictable results.[47] Indeed, the principle of close connection, far from embodying some kind of self-contained a priori method, is a *tool* for pluralism.[48] It begs to be filled with meaning. What amounts to a 'close' connection? Why do we recognise foreign connections? What values do we use to identify what connections are relevant? Is the connection to be based on, say, personal factors, so that the applicable law is one with which the individual identifies, or is it to be based on socio-political factors, such as the bond of citizenship?[49]

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[44] See P Nygh, 'The Territorial Origin of English Private international Law' (1964) 2 *University of Tasmania Law Review* 28.

[45] FA Mann said that '[t]he whole of the conflict of laws is concerned with the question: which, in a given situation, is the law closely or most closely connected with the matter in issue?': FA Mann, 'The Proper Law in the Conflict of Laws' (1987) 36 *International & Comparative Law Quarterly* 437, 438.

[46] Savigny (*supra* n 42), section 349; O Kahn-Freund, 'Reflections on Public Policy in the English Conflict of Laws' (1953) 39 *Transactions of the Grotius Society* 39, 43.

[47] *Dicey, Morris and Collins* (*supra* n 11) ch 1; AJE Jaffey, *Topics in Choice of Law* (BIICL, 1996) ch 1.

[48] On a pluralist theory of the conflict of laws, cf P Schiff Berman, 'Conflict of Laws and the Legal Negotiation of Difference' in Austin Sarat et al, *Law and the Stranger* (Stanford University Press, 2010) 141; P Schiff Berman, 'Choice of Law and Jurisdiction on the Internet' (2005) 153 *University of Pennsylvania Law Review* 1819.

[49] See K Knop, 'Citizenship Public and Personal' (2008) 71 *Law & Contemporary Problems* 309, 319-20, on the contrasting values behind domicile and citizenship.

Hence, modern conflict of laws is about more than the mindless counting of geographical connections. It evaluates the meaningfulness of connections; and it does not close its eyes to the policy implications of its rules, or to the downstream effects of their application.[50] In other words, it practises an open-ended normative self-awareness.[51] For example, liability for personal injury is governed by the law of the place where the injury was sustained,[52] not because that place has the greatest geographical connection with the claim, but because of a policy choice to prioritise 'the claimant's law' over 'the wrong-doer's law'.[53] This choice reflects one of the main objectives of modern personal injury law, which is to compensate the victim, 'whose expectations will … be based on his rights and liabilities under the law of the country where he was harmed and with which he will usually be independently connected'.[54]

This does not mean that 'anything goes'. As we have just seen, the process of characterisation is designed to aid in the identification of relevant values; and as a principled and rational system of law, the conflict of laws must strive for normative coherence. This coherence is achieved through an explorative and contextual engagement with values, rather than a mechanistic application of pre-determined principles.[55] It is not useful, for example, to fall back on 'the parties' reasonable and legitimate expectations', 'comity', and 'public law or policy' *in the abstract*, without exploring what they really mean in relation to a particular issue, and to what extent they are, in fact, relevant.[56] In the abstract, such principles have a tendency

[50] Cf O Kahn-Freund, *General Problems of Private international Law* (Sijthoff, 1976) 259 on the functional diversification of connecting factors.
[51] On a self-conscious, explicit engagement with the values behind conflicts of laws, cf Berman (*supra* n 48); L Little, 'Conflict of Laws Structure and Vision: Updating a Venerable Discipline' (2015) 31 *Georgia State University Law Review* 231; A Riles, 'Cultural Conflicts' (2008) 71 *Law and Contemporary Problems* 273.
[52] Private international Law (Choice of Law in Tort) Act 2018, s 8(1)(a).
[53] See English and Scottish Law Commissions, *Private international Law: Choice of Law in Tort and Delict* (Working Paper No 87/Consultative Memorandum No 62) para 4.78.
[54] *Ibid*, paras 4.74, 4.70.
[55] Thus, framing the problem around a personal-public dichotomy is not helpful: see A Mills, 'The Identities of Private international Law' (2013) *Duke Journal of Comparative & International Law* 445, 473: 'Advocating for a particular 'identity' for private international law may therefore ultimately best be characterized less as a contest of legal arguments or traditions, and more as a choice between competing values.'
[56] Jaffey (*supra* n 47) ch 1 ('The Foundations of Choice of Law Rules').

to conceal rather than illuminate. The principle of the parties' reasonable expectations, for example, could be used to take account of the parties' ability to identify with a legal system, their geographical, personal or social connectedness to a country, the extent to which the connection was shared, their original assumption that a particular law would govern, or any other factor that a reasonable party in the circumstances would consider to be relevant. And while comity and the parties' expectations are important yardsticks to measure the effectiveness of conflict of laws rules, they are not – and should not – be our sole reference points.

D. A first principles examination of New Zealand's conflicts rules on couples' property

The purpose of this Section is to inquire into the relevant values that should shape New Zealand's conflicts rules on couples' property, by working through the three steps for devising rules of subject-matter jurisdiction and choice of law: characterisation, identification of subject-matter limitations, and the selection of appropriate connecting factors for the purposes of choice of law. As we have just seen, this inquiry should make full use of the pluralist potential of the modern conflict of laws.

The upshot of this, of course, is that there is much scope for debate about the 'right' conflicts approach to couples' property. This paper argues that we should adopt an internationalist approach.[57] We should focus on the couple's proprietary *relationship*, rather than the property, in order to facilitate the effective dissolution of the 'personal property relationship' and recognise its personal and social connections to foreign legal systems.

1. *Characterisation of personal relationships and their effect on property*

[57] On 'internationalism' as a basic conflicts approach, see M Pryles, 'Internationalism in Australian Private international Law' (1989) 12 *Sydney Law Review* 96.

The starting point for determining the court's subject-matter jurisdiction over claims relating to couples' property, and for identifying the appropriate choice of law rule(s) for such claims, is the process of characterisation. If the PRA did not already come with its own unilateral choice of law rule defining the scope of its application, then how would we characterise its rules – or similar foreign rules, for that matter – to determine the circumstances in which it ought to be applicable?

(a) *Focus on the relationship, not the property*

The function of the PRA is to divide up a couple's property following the end of their relationship. Are the rules of the PRA similar in that sense to, say, applications for ancillary relief under the Matrimonial Causes Act 1973 (England and Wales) (the English Act)? English law does not provide for the sharing of property acquired in the course of a relationship, but vests the court with a discretion to redistribute property upon dissolution of a marriage.[58] Or are they similar to constructive trust claims alleging an unconscionable assertion of ownership by one spouse or partner, to property to which the other spouse or partner has contributed? An inquiry into this question shows that the PRA should be characterised so as to focus on the couple's relationship, not their property,

When answering this question, it is important not to focus too much on the form of the claim. The fact that constructive trust claims are equitable in nature should not prevent them from being considered in the same conflict of laws category as applications under the PRA. It is the issue, and not the claim, that is to be characterised, by reference to the function of the substantive rules. Similarly, the fact that English law deals with couples' property by way of ancillary relief upon dissolution of the relationship, and does not provide for what is

[58] Matrimonial Causes Act 1973.

conventionally understood as a matrimonial property regime, should not automatically lead to the English rules being characterised differently from applications under the PRA.[59]

So it would be necessary to ask, for instance, whether the conflict of laws should draw a distinction between rules that create rights in the division of couples' property, and rules that simply confer a judicial discretion to re-distribute property once a relationship has been dissolved (as does the English Act), and rules that seek to reverse the wrongful deprivation of rights between spouses or partners (as do constructive trusts). Are these rules sufficiently functionally similar for the purposes of the conflict of laws?

This is not a matter of science but judgement. If the conflict of laws chooses to focus on the proprietary dimensions of the rules on couples' property, and to view the parties as, first and foremost, property rights holders, it might well distinguish between rules that create a right to share in couples' property (like the rules in the PRA), and rules like sections 23 and 24 of the English Act that provide for a discretion to redistribute property between former spouses. The starting point would be the particular property that is said to have been affected by the relationship, and the question who has rights in the particular property.[60] The conflict of laws would prioritise property-related considerations, such as security of title, enforceability in the place where the property is located, and third party interests in the property.[61] Some US common law systems adopt a clearly proprietary view of couples' property conflicts, leading them to distinguish between movable and immovables, and to apply the law of domicile at the

[59] But cf English criticism of the Council Regulation (EU) No 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2016] OJ L183/1 in Bar Council of England and Wales, 'Response of the Bar Council of England and Wales to the Green Paper' (2006) and Resolution, 'Response to Green Paper on Conflict of Laws in Matters Concerning Matrimonial Property Regimes, Including Question of Jurisdiction and Mutual Recognition' (2006).
[60] Cf s 7, PRA.
[61] See, eg, *MacMillan Inc v Bishopsgate Investment Trust Plc* [1996] 1 WLR 387 (CA), on the reasons for the *lex situs* rule.

time of acquisition of the property.[62] English common law rules are more ambiguous but follow the same distinction between movable and immovable property.[63]

On the other hand, if the conflict of laws chooses to focus on the nature of the parties' relationship, it might be more concerned with the unique 'institutional' function of couples' property rules. To that end, it might treat the PRA, civil law property regimes, the English Act and even constructive trusts as going to the same question: to what extent does the fact that the parties are (or were) in a personal relationship bear on the allocation or distribution of property between them, either in the course of, or upon dissolution of, their relationship? An important concern of many of these laws is the protection of parties who contribute to the relationship through non-financial means (rather than the acquisition of assets). If this is the focus, the conflict of laws would design rules that, above all, facilitate the cross-border treatment of the property consequences of personal relationships (rather than the determination of rights in particular property).

In this author's view, this latter approach based on the property consequences of the relationship (or the 'personal property relationship') is preferable to a strict focus on property. One of the main purposes of the PRA is to recognise non-financial contributions to personal relationships.[64] The Act 'operates upon 'property' … [but is] aimed at supporting the ethical and moral undertakings exchanged by [couples]'.[65] So it would be unduly legalistic – and self-defeating – to characterise questions of couples' property through a narrow proprietary lens. Conflict of laws rules such as the lex situs rule do not seem to capture adequately the economic realities of personal relationships – the role of non-financial contributions, and the way spouses or partners relate to each other or to the societies they live in. The conflict of laws should strive to respond to these realities. This does not mean that it cannot take into account property-

[62] Symeon Symeonides, *Choice of Law* (Oxford University Press, 2016) 604.
[63] *Dicey, Morris & Collins* (*supra* n 11) ch 28.
[64] PRA, s 1N(b)
[65] *Reid v Reid* [1979] 1 NZLR 572 (CA) 580.

specific concerns, such as the enforceability of judgments over foreign land, but these concerns should not distort the overall approach to characterisation. A focus on the relationship is also more closely aligned with the predominant approach taken by civil law jurisdictions, which tend to focus on the parties rather than the property.[66]

(b) *Issues relating to the 'property consequences' of 'personal relationships'*

If the proposed rules are to capture issues relating to the property consequences of personal relationships, it will be necessary to determine what kinds of relationships amount to a qualifying 'personal relationship' for the purposes of the rules, and what kinds of claims can be considered to deal with the 'property consequences' of personal relationships.

(i) Personal relationships - It has already been noted that the PRA applies to formal and informal relationships, including marriage, civil unions and de facto relationships. Many other jurisdictions approach things differently, however. They may exclude informal relationships from regulation, or they may maintain a distinct regime for relationships other than marriage. The question is whether these differences should be reflected on the level of the conflict of laws, too. European Union law, for example, has distinct regimes for married couples and registered partnerships.[67]

In the New Zealand context, the better view is that the conflict of laws should not maintain parallel regimes for different relationships. This is consistent with the PRA's substantive rules, which do not distinguish between different kinds of relationships. It also reflects one of the principal aims of characterisation, which is to bridge cross-border differences by capturing rules that are similar in function, even if they differ in form and content.

[66] See, eg, EU Reg on Matrimonial Property (*supra* n 59).
[67] *Ibid*; Council Regulation (EU) No 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships [2016] OJ L 183/30.

Thus, whether a claim relates to the property consequences of a relationship, in a way that is functionally similar to claims under the PRA, is a question for the conflict of laws. But questions relating to the particular form of the relationship, and whether it is of a kind to qualify for relief, should in principle be questions for the applicable law.[68]

There is much diversity in the way that countries approach formal relationships other than marriage. The proposed approach may cause difficulties where the applicable law is narrowly drafted so as to apply to formal relationships specific to that country. In such cases, it is important that the applicable law also accords recognition to similar foreign relationships. New Zealand law does so via the Civil Union Act 2004. Thus, the PRA applies to 'civil unions', which means either a civil union entered into under the Civil Union Act 2004 or an overseas relationship recognised by the Civil Unions (Recognised Overseas Relationships) Regulations 2005.[69] The number of relationships currently recognised by the Regulations is limited, however, so the practical utility of this particular regime may be questioned. In practice, it is more likely that the PRA will apply to similar foreign relationships on the basis that the couple are also in a de facto relationship.

(ii) Property consequences - In relation to the second question, too, a broad approach is beneficial. A claim will relate to the 'property consequences' of a personal relationship even if it differs in form or substance from claims under the PRA. So it would be immaterial, for example, whether the claim is based on a foreign law that, unlike New Zealand law, recognises full community of property, or treats couples' property and maintenance as one and the same question,[70] as long as the foreign law deals with the same problem as the PRA.

[68] If the relationship is recognised in one jurisdiction but not another, this may well be a factor in identifying the applicable law: see *infra* D3(c).
[69] S 5, Civil Union Act 2004.
[70] eg Matrimonial Causes Act 1973 (England and Wales); see Schuz (*supra* n 1); but cf English criticism of the then proposed EU Reg on Matrimonial Property (*supra* n 59), on the basis that English law (in the form of a

A difficult question in this context is whether the proposed conflict of laws rules should go so far as to extend to issues of maintenance. New Zealand law currently treats maintenance and relationship property as separate issues.[71] The purpose of maintenance is to meet the applicant's reasonable needs following separation;[72] the purpose of orders under the PRA is the just division of relationship property. On one view, the conflict of laws should reflect this functional distinction. An obligation to pay maintenance may raise different conflicts considerations from the division of property. For example, the relevant connecting factor may take account of the couple's current circumstances, including their current place of residence, instead of focusing on the couple's past relationship;[73] or it may reflect a policy of protecting the creditor.[74]

Yet there would certainly be benefits to applying the same law to both couples' property and maintenance. In some countries they are treated as functionally equivalent.[75] Even where they are kept separate, they are necessarily closely connected. Thus, under New Zealand law, a court may have to take account of maintenance payments to determine a just division of relationship property, or it may have to take account of orders for the division of property to determine the applicant's need for maintenance.[76] If couples' property and maintenance are governed by separate laws, there may be limited scope to ensure that the regimes operate consistently, which may lead to injustice.[77] Moreover, the New Zealand Law Commission has proposed that the two regimes be merged,[78] which would strengthen the case for extending the

judicial discretion under the Matrimonial Causes Act to re-distribute property once a relationship has been dissolved) serves a different function to civil law matrimonial property regimes: *supra* n 59.

[71] Family Proceedings Act 1980, s 64.

[72] *Ibid.*

[73] Cf s 4, Family Proceedings Act 1980; Hague Protocol on the Law Applicable to Maintenance Obligations (opened for signature 23 November 2007, entered into force 1 August 2013) Art 3.

[74] Cf Hague Maintenance Protocol (*ibid*) Art 3.

[75] Matrimonial Causes Act 1973 (UK).

[76] See Law Commission (*supra* n 3) paras 19.59ff.

[77] But note that New Zealand currently applies the *lex fori* to questions of maintenance, and that the New Zealand law of maintenance provides sufficient flexibility to take account of previous orders for the division of property: ss 4 and 65(2)(a)(ii), Family Proceedings Act 1980; Law Commission (*supra* n 3) para 19.66.

[78] Law Commission *Review of the Property Relationships Act 1976 – Preferred Approach* (NZLC IP44, 2018).

conflict of laws rules to maintenance. This question would benefit from further analysis by reference to the law of maintenance, particularly if the Law Commission's proposal is adopted.

(c) *Focus on the social and personal dimensions of the relationship*

Before turning to the questions of subject-matter jurisdiction and choice of law, it is useful to inquire further into the nature of personal property relationships. Should the relationship be approached as a social construct, a relationship that needs to be regulated within its social context (that is, in accordance with the interests or policies of the wider community)? If so, the conflict of laws may identify communities to which the parties belong (so as to emphasise connections with these communities),[79] or it may pursue substantive social goals.[80] Or should the conflict of laws be more concerned with the personal nature of the relationship, as a relationship between two individuals, who may identify with one legal order more than another, or who may have made certain assumptions about the laws that would govern their affairs?[81] These personal connections may also be shaped by the parties' cultural or religious background.[82]

There is no *a priori* discoverable seat to be allocated to the relationship,[83] and so it is up to the conflict of laws to strike the best balance. In this author's view, it would be useful to recognise the multifaceted nature of personal property relationships, and to focus on both their personal and social dimensions.[84]

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[79] G Kegel, 'The Crisis of the Conflict of Laws' (1964) 112 *Recueil des Cours* 92, 186.
[80] See, eg, Hague Maintenance Protocol (*supra* n 73) Art 4.
[81] See T Hartley, 'Matrimonial (Marital) Property Rights in Conflict of Laws: a Reconsideration' in J Fawcett (ed), *Reform and Development of Personal Internatioanl Law: Essays in Honour of Sir Peter North* (Oxford University Press, 2003) 215, 225 ('the justification for applying the law of the domicile is that it is likely to reflect the values, attitudes and expectations of the parties').
[82] For example, an orthodox Jewish couple who are domiciled in New Zealand but have organised their affairs on the basis of Jewish law. See E Jayme, 'Identité culturelle et intégration: le droit international privé postmoderne' (1995) 251 *Recueil des Cours* 9.
[83] See *supra* C2(b); *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] QB 825 (CA), [27].
[84] Cf the exclusionary effect of the public-personal dichotomy on conflict of laws reasoning: see *supra*.

The 'personal' dimension is a familiar feature in conflict of laws reasoning. People craft their personal relationships within certain legal contexts. They make assumptions about the rights and obligations that will govern them; they may have organised their affairs on that basis; and they may identify with certain legal systems or communities (places they call home, or at least feel personally connected to).[85] These are all worthy values for the conflict of laws to take into account, and they are commonly considered under the umbrella of 'reasonable and legitimate expectations'.[86] They are values that are focused on the individuals, as actors on the international plane.

This does not mean, however, that international couples are somehow detached from the social environment within which they live. The function of the PRA (and similar laws) is to recognise contributions to personal relationships and manage their consequences for property. It is concerned with the organisation of family life, and so it is, at heart, a piece of social legislation.[87] The conflict of laws should not divorce personal property relationships from their social setting, the communities within which they operate, simply because the relationship has foreign elements (or there is more than one community that may have a regulatory claim).[88] It should recognise the social function of couples' property law, in order to reflect the place of the relationship within societal structures.[89]

This emphasis on the social dimension will obviously affect the connections that the conflict of laws considers to be relevant. The connections will draw on the social values that underlie the law on couples' property, which may even include principles of substantive law. An important principle that comes to mind in this context is that of gender equality or non-discrimination. The conflict of laws should contribute to the creation of fair and just societies,

[85] See Y Nishitani, 'Global Citizens and Family Relations' [2014] *Erasmus Law Review* 134.
[86] *Dicey, Morris & Collins* (*supra* n 11) para 1-005.
[87] *Reid v Reid* [1979] 1 NZLR 572 (CA) 580.
[88] For the point that cross-border relations tend to have multiple 'community affiliations', see Schiff Berman 'Conflict of Laws and the Legal Negotiation of Difference' (*supra* n 48).
[89] See the argument *supra*, that characterisation is undertaken by reference to the function of the substantive law.

and not perpetuate existing injustices. For example, an exclusive focus on the husband's domicile clearly should form no part of a modern system of conflict of laws.[90]

It is now time to consider in more detail what this conclusion – that the conflict of laws should focus on the personal property *relationship*, and its personal and social dimensions – means for the scope of the court's subject-matter jurisdiction and the question of choice of law.

2. *Universal subject-matter jurisdiction*

The New Zealand conflict of laws limits the court's subject-matter jurisdiction over matters it considers to be inherently territorial in nature,[91] although increasingly it has dropped subject-matter limitations in favour of taking an overall more coordinated approach to jurisdiction.[92] This paper argues that the court should have near universal subject-matter jurisdiction to hear couples' property claims, subject to a power to decline jurisdiction (over the claim as a whole or specific property). In particular, jurisdiction should not be confined to relationships (or parties) that have a close personal connection to New Zealand (Pt (a)); and it should also extend to foreign immovables (Pt (b)).

(a) *No exclusion of particular relationships*

Personal property relationships do not raise issues that are inherently territorial. They are not inextricably linked with domestic procedures, infrastructure or control (as is the creation of intellectual property rights, for example, or the *in rem* transfer of property). They need not be characterised as a public matter, that is concerned with the exercise of state authority and

[90] *Dicey, Morris & Collins* (*supra* n 11) para 28-011.
[91] Hook (*supra* n 25) 449.
[92] For example, *Kabushiki Kaisha Sony Computer Entertainment v Van Veen* HC Wellington CIV-2004-485-1520, 14 December 2006, [19] (that the *Mocambique* rule should not exclude jurisdiction in respect of actions for breach of foreign intellectual property rights); *Schumacher v Summergrove Estates Ltd* [2013] NZHC 1387 (that the *Mocambique* rule did not exclude jurisdiction in respect of a constructive trust claim), but contrast *Burt v Yiannakis* [2015] NZHC 1174, [2015] NZFLR 739 (HC); see also the court's relatively recent power in r 7.81 of the High Court Rules to grant interim relief in aid of foreign proceedings, or implementation of the Model Law on Cross-Border Insolvency in the Insolvency (Cross-border) Act 2006.

protection of local societies or markets (as is criminal law, for example, or competition law). They are also clearly distinguishable from the dissolution of marriage, which is concerned with the couple's status and may still be treated as a matter *in rem*;[93] and they do not compare to the winding up of a company.[94]

Rather, they are concerned with the couple's *in personam* rights and obligations, which is not a matter that ordinarily attracts subject-matter limitations. In these circumstances, the principal reason why the conflict of laws may potentially impose limitations on subject-matter jurisdiction would be as a result of applying a unilateral choice of law rule, to manage the scope of the application of the law of the forum. [95] We will consider this question – whether personal property relationships should be governed by the *lex fori* – below.

It follows that the court's jurisdiction should not be confined to specific relationships (such as couples who are, or were, domiciled in New Zealand).[96] Any subject-matter limitation of this kind would pose a risk that claimants may be unduly deprived of their access to justice.[97]

(b) *Inclusion of immovables*

This leaves the question of subject-matter jurisdiction over foreign immovables. The starting point is that, if the 'true issue' is the personal property relationship, and not the property, it would be desirable to determine the matter on a holistic (universal) basis. There is one issue (the property consequences of the relationship), to be determined in one jurisdiction; not

[93] *Salvesen v Administrator of Austrian Property* [1927] AC 641, 662 (Viscount Dunedin); although subject-matter limitations on divorce may now be motivated mainly by the desire to apply the *lex fori* rule (which, in turn, requires subject-matter limitations to limit the scope of the law of the forum).
[94] *Dicey, Morris & Collins* (*supra* n 11) Rule 176, on the court's jurisdiction to wind up companies that are registered in England or sufficiently closely connected to the forum.
[95] See Hook (*supra* n 25) 450.
[96] For criticism of the use of matrimonial domicile as a basis for jurisdiction in divorce, see Law Commission (England and Wales), *Family Law: Jurisdiction in Matrimonial Causes (other than Nullity)* (Working Paper No 28, April 1970) 13.
[97] On the need for access to justice, see Law Commission (England and Wales), *Family Law: Report on Jurisdiction in Matrimonial Causes* (No 48, 1972) 5-6. If subject-matter limitations are considered necessary, they should at least be accompanied by a principle of *forum necessitatis*.

numerous issues (rights in particular items of property), to be determined in numerous jurisdictions. This is also increasingly the approach taken to succession and insolvency.[98] On that basis, therefore, the court's subject-matter jurisdiction should extend to allow the court to take into account all property, movables and immovables, wherever located. An added benefit of this approach is that it avoids tricky problems in classification (for example, are pension rights immovable or movable, [99] and what about the proceeds of sale from foreign land? [100]).

There are countervailing considerations, however, that ought to be taken into account. The first is that the court should not make orders that it is not capable of enforcing.[101] Hence, the court's subject-matter jurisdiction should not extend to orders vesting title (in rem) in foreign property, especially if title depends on registration. Such an order would lack any basis in reality, because it would depend on local authorities to enforce it, who may very well disagree with the order. Jurisdiction must instead be limited to *in personam* relief (for example, in the form of an order that the defendant pass title; or a compensation order that simply takes into account the value of the property).

Even then, it is no small matter for a court to make an *in personam* order in relation to foreign immovables, which may form an intricate part of the legal, political and social fabric of the situs. This is especially so if there is a chance that the courts of the situs would have dealt with the matter differently or – worse – if they will grant conflicting relief. The latter scenario would also be a source of real injustice for the parties.

Nevertheless, my view is that *in personam* orders in relation to immovables – or, indeed, orders that merely take into account the value of foreign immovables – should not ordinarily

[98] Insolvency (Cross-border) Act 2006 (NZ); in relation to succession, see, eg, *Dicey, Morris & Collins* (*supra* n 11) Rules 147-8.
[99] See *Tyson v Tyson* [2000] NZFLR 927 (DC); *Fischbach v Bonnar* [2002] NZFLR 705 (FC); cf EU Reg on Matrimonial Property (*supra* n 124) Art 1(2)(f) excluding pensions from its scope.
[100] See *Shepherd v Shepherd* [2009] NZFLR 226 (HC).
[101] See, eg, *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2003] UKHL 30, [2004] 1 AC 260, [26] per Lord Bingham ('I would not accept that the court has power to make an order which, if made, would lack what has been legislatively stipulated to be a necessary consequence of such an order'); followed recently in *Taurus Petroleum Ltd v State Oil Company of the Ministry of Oil, Iraq* [2015] EWCA Civ 835.

be considered out of bounds. It is not uncommon for other jurisdictions to provide for such a power in the context of claims relating to couples' property;[102] and the *Moçambique* rule, too, is now arguably too narrow to present a barrier to jurisdiction.[103] There even seems to be movement towards the (indirect) enforcement of foreign *in personam* orders relating to domestic land.[104] And it seems incongruous and outdated to recognise the court's jurisdiction in relation to foreign immovables for the purpose of the administration of an estate or trust but not for the purpose of couples' property,[105] especially because parties would not usually expect the courts of the situs to retain exclusive jurisdiction.[106] Overall, the benefits of universalism should trump any lingering concerns relating to comity, sovereignty or socio-political overreach.

These concerns may be accommodated, instead, by a more flexible approach to subject-matter jurisdiction that has as its primary goal the effective coordination of couples' property claims across borders. To that end, courts should have a discretion to decline the exercise of jurisdiction, over the claim as a whole or in relation to particular property.[107] Where the relief granted in relation to foreign property is unlikely to be effective, or where there is a risk of irreconcilable decisions, or where another court has already assumed jurisdiction, the court should consider its role in the dissolution of the personal property relationship and be prepared to adjust the form of relief or,[108] exceptionally, to decline judgment.[109] This should also be the

[102] See, eg, EU Reg on Matrimonial Property (*supra* n 59); *Hamlin v Hamlin* [1986] Fam 11.
[103] See *supra* B3.
[104] See TM Yeo, 'The Effective Reach of In Personam Reasoning in Private international Law' (Yong Pung How Professorship of Law Lecture, 2009) <http://ink.library.smu.edu.sg/yph_lect/2> [37]-[44]; cf *Shami v Shami* [2012] EWHC 664 (a case on recognition).
[105] On this exception to the *Mocambique* rule, see *Dicey, Morris & Collins* (*supra* n 11) Rule 131.
[106] But cf *Burt v Yiannakis* [2015] NZHC 1174, [2015] NZFLR 739 (HC), [54].
[107] Cf s 7(3); EU Regulation No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L 201/107, Art 12.
[108] See the PRA on the different forms of relief available.
[109] This should be an evidence-based decision.

case if the property in question is situated in New Zealand: an approach based on universalism does not support a protectionist mindset.

3. *Choice of law: a multilateral choice of law rule, subject to party choice*

It is now necessary to turn to the second main function of the conflict of laws, choice of law, and to ask what is the most appropriate law to govern the property consequences of personal relationships? This paper argues that the choice of law rule should be multilateral in nature (meaning a choice of law rule that may lead to the application of foreign law), and that it should give effect to the law with the closest connection based on the personal and social dimensions of the relationships. In addition, the parties should be free to choose the applicable law.

(a) *Multilateralism over unilateralism*

The first point to determine is whether personal property relationships should be governed by the law of the forum (based on a unilateral approach), or whether they may also be governed by foreign law (based on a multilateral approach). Multilateral choice of law rules work well where the relevant substantive laws are functionally similar to those in other countries. The greater the disparity in functions, the more difficult it is to devise a meaningful two-way connecting factor. This paper has argued that the PRA is concerned with the property consequences of personal relationships and that, in that sense, it is functionally similar to comparative regimes in other jurisdictions. It follows that a multilateral choice of law rule would be appropriate in principle. The benefit of such a rule would be that it recognises relevant connections between the relationship and the applicable law, regardless of whether the connections are foreign or domestic. These connections may reflect the personal and social dimensions of the relationship, giving effect, for example, to the parties' expectations that a particular law will apply, or to community ties with the couple's place of residence.

A broad unilateral approach, on the other hand, would disregard these connections in order to prioritise domestic policies. Such an approach may be consistent with a focus on the social dimension of the relationship in particular. For example, the principle of equal sharing in the PRA might be a social policy of such importance that it should be applied to all personal property relationships, even if they are only loosely connected to New Zealand. It is no small thing for the New Zealand court to apply foreign laws that, based on domestic standards, run counter to the principle of just division,[110] especially if the claim has *some* connection to New Zealand. Thus, in an area of law like couples' property that strikes at the heart of a country's social values, lawmakers will have to think carefully before giving effect to foreign notions of justice.[111]

But on balance, these concerns should not trump the values underpinning the principle of connection. Unilateral choice of law rules are inherently parochial and should be used sparingly where a multilateral connecting factor is feasible in principle. In addition to denying meaningful connections between a claim and foreign legal systems, they result in overlapping applicable laws and encourage forum shopping. Most common law choice of law rules traditionally adopt a multilateral approach: for example, the law applicable to a contract, in the absence of choice by the parties, is the law with the closest and most real connection;[112] the general choice of law rule for property is the *lex situs*;[113] and the common law choice of law rules on (movable) matrimonial property are based on the law of the matrimonial domicile.[114] Even in areas that have traditionally been forum-focused, like the law of torts, the New Zealand

[110] See PRA, s 1N.
[111] See F Vischer, 'General Course on Private international Law' (1992) 232 *Recueil des Cours* 9, 123; see the Bar Council of England and Wales, 'Response of the Bar Council of England and Wales to the Green Paper' (2006) and Resolution, 'Response to Green Paper on Conflict of Laws in Matters Concerning Matrimonial Property Regimes, Including Question of Jurisdiction and Mutual Recognition' (2006).
[112] *Bonython v Commonwealth of Australia* [1951] AC 201 (PC).
[113] *MacMillan Inc v Bishopsgate Investment Trust Plc* [1996] 1 WLR 387 (CA).
[114] *Dicey, Morris and Collins* (*supra* n 11) Rule 165.

conflict of laws has become receptive of foreign rules.[115] Personal property relationships should not be an exception. It is worth nothing here that multilateral choice of law rules are subject to a public policy exception to ensure the protection of significant forum interests, and that this exception would still serve to protect New Zealand's most fundamental policies on couples' property.

Another reason that is sometimes offered in favour of a unilateral approach are the difficulties associated with pleading and proving foreign law.[116] These difficulties are not to be taken lightly. Parties may not be well equipped to identify conflicts of laws and arrange for reliable expert witnesses. It would no doubt be challenging for spouses litigating in New Zealand to prove the content of, say, Polish law: they may have to look overseas for a suitable expert witness, at considerable expense.[117] This concern is particularly valid if the governing choice of law rule does not point clearly to one law being applicable. What if there are two or three possible contenders, and the parties have to work out their respective positions under each to determine whether it is worth pleading foreign law? This is a considerable weakness of multilateralism. But it is offset by the benefits that come with the reception of foreign law into the forum, both in the particular case and on a more systemic level. So our efforts should be directed at facilitating access to foreign law,[118] and aiding in its application,[119] rather than at the deconstruction of the multilateral method.

[115] For example, the Private International Law (Choice of Law in Tort) Act 2017 (NZ) recently abolished the double actionability rule for torts and replaced it with a general *lex loci delicti* rule.
[116] See Ministry of Justice (UK), *European Commission proposed Regulations on matrimonial property regimes and the property consequences of registered partnerships: Response to public consultation* (28 November 2011) [5]; CMV Clarkson, 'Matrimonial Property on Divorce: all Change in Europe' (2008) 4 *Journal of Private international Law* 421, 430.
[117] *Radmacher v Granatino* [2010] UKSC 427, [2011] 1 AC 534, [105], where the Supreme Court noted the expense of proving foreign law in the context of maintenance claims.
[118] For international efforts to facilitate access to foreign law, see P Lortie and M Groff, 'The Evolution of Work on Access to Foreign Law at the Hague Conference on Private international Law' in Y Nishitani (ed), *Treatment of Foreign Law – Dynamics towards Convergence?* (Springer, 2017) 615.
[119] For example, conflicts rules could provide guidance on what to do when the foreign law does not contemplate application by courts outside of the forum.

(b) *Unity*

Another question is whether there should be more than one applicable law to govern different aspects of the claim. In principle, because the 'true' issue is the dissolution of the personal property relationship, the choice of law rule should enable a 'unitary' determination of the claim based on one applicable law.[120] The purpose is not to determine rights in particular property but to administer the proprietary consequences of the relationship as a whole. This can be achieved more easily and coherently if there is only one law to be applied.[121] It is also unrealistic to think that the parties would have expected their claim to be fragmented across several laws. Consequently, one law should govern both movable and immovable property, and there is no room for a principle of mutability that requires application (and re-application) of the relevant connecting factor as property is being acquired.

None of this is to say that the unitary approach should be rigid and without exception. An obvious drawback of the approach is that it does not give a voice to the situs of immovable property, which, in some circumstances, may have a strong regulatory claim to matters affecting the property, or which, in any case, might not enforce an order that is inconsistent with the *lex situs*. A possible mechanism to address such concerns would be to provide for the application of overriding mandatory rules of the situs.[122] For example, a New Zealand court that has been asked to determine matters relating to a family home situated overseas could be given the option of applying any overriding mandatory rules of the *lex situs* relating to such matters.

(c) *The proposed multilateral connecting factor*

[120] See also EU Reg on Matrimonial Property (*supra* n 59) Art 21 and Recital 43; EU Succession Regulation (*supra* n 107) Art 23 and Recital 37; cf *Slutsker v Haron Investments Ltd* [2013] EWCA Civ 430, [37].
[121] On the benefits of a unitary approach, see Jan von Hein, 'Conflicts between International Property, Family and Succession Law – Interfaces and Regulatory Techniques' (2017) 6 *European Property Law Journal* 142, 143-7.
[122] Cf EU Succession Reg (*supra* n 107) Art 30; see von Hein (*ibid*) 147-57.

The final task is to devise a multilateral connecting factor that designates the law with the most meaningful – the 'closest' – connection to personal property relationships. Hidden behind the principle of close connection are nuanced values that call for recognition, capturing the personal and social dimensions of the relationship. These values include respect for the social context of the relationship, and the parties' agency and expectations in shaping it.[123] The relationship should be seen as a whole, within the exercise of universal subject-matter jurisdiction, and governed by one applicable law. It should be seen as embedded in its social environment(s), and within the context of the actual lives lived and crafted by the parties to the relationship.[124]

Thus, the connecting factor should be sufficiently open-ended to capture the fluid nature of such relationships and the variety of connections that may be relevant in each case.[125] A connecting factor based on the couple's shared place of domicile or residence, for example, could take too closed a view of the relationship. Instead the court should identify the law with the closest and most real connection to the relationship, by reference to a non-exhaustive list of factors that would give meaning to the kind of 'connection' that should be prioritised.

These factors could include: places of common residence, and the extent to which parties are integrated in local society; places of common domicile, and the extent to which parties continue to identify with – or have become alienated from – these places; whether the place of shared residence is also the domicile of one of the parties; the length of time spent in these places, and the length of time that has passed since then; whether the parties organised their affairs on the basis of a particular law; whether they expected a particular law to apply; and whether the purposes or fundamental principles of couples' property law favour one connection over another. For example, where the parties are in a non-traditional relationship (a

[123] Cf Nishitani (*supra* n 85).
[124] Cf the expression 'life actually lived' in EU Reg on Matrimonial Property (*supra* n 59) Recital 49.
[125] On the benefits of multifactor approaches in choice of law, see L Brilmayer and R Anglin, 'Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger' (2010) 95 *Iowa Law Review* 1125.

relationship other than marriage, such as a registered partnership, civil union or de facto relationship), an important consideration in the court's assessment should be whether the law in question recognises the particular kind of relationship.[126]

Balancing these considerations presents an obvious challenge. In some cases, they may seem to stand in direct conflict: for example, what is the law with the closest connection if the parties first lived ten years in a country they considered home, and then lived ten years in a country that was not, however, their domicile? What if the same parties assumed that the law of their domicile would govern, but in all other respects they have become alienated from their home country? And what if the current place of residence is also the current (or former) place of domicile of one of the parties? Or perhaps the domiciled party coerced his or her partner into leaving the couple's home, which may implicate considerations relating to equality and weigh against the new place of residence.

Such cases may be closely balanced. But the subtlety of the inquiry only serves to bring home the relative normative vacuity of pre-determined connecting factors (like the parties' first common habitual residence, for example).[127] Is it really appropriate, for example, to apply French law, as the law of the place where the couple first resided after marriage, if they are both domiciled in New Zealand and have not lived in France for 20 years? The lack of nuance associated with fixed connecting factors would be a high price to pay for greater predictability; and determining the domicile of a person or relationship, or a couple's place of habitual residence, is not necessarily a straightforward exercise, either.

(d) *Party choice*

[126] Otherwise there may be a 'legal vacuum', which would be particularly concerning in the case of registered relationships: see Council Reg on the Property Consequences of Registered Partnerships *(supra* n 67) Recital 44.
[127] eg EU Reg on Matrimonial Property (*supra* n 59) Art 26.

This leaves the question to what extent the parties should be free to choose the law applicable to their relationship. As has been argued elsewhere, this question should be answered by reference to the objective choice of law rule proposed above – and more specifically, by reference to the considerations that shape the rule.[128] Should the parties be able to contract out of the rule, or are the aims that it pursues beyond the proper reach of party autonomy? There is obvious value in recognising the parties as autonomous actors on the international plane, and enabling them to organise their affairs with certainty and predictability. But the question admits no easy answer given the mixed 'personal' and 'social' assessment that the rule calls for, as well as legitimate concerns regarding inequality in bargaining power.[129]

On balance, the benefits associated with party choice mean that New Zealand courts should give effect to it, even though the parties might choose a law that lacks a social connection to their relationship. For example, a young German couple chooses German law to govern their relationship before moving to New Zealand and living here for 20 years. If the couple separates, this choice should be effective even though, after 20 years, it is likely that the relationship has close social ties to New Zealand. New Zealand has provided the social context for the relationship, and the local community may have a general interest in having its law applied. Yet the value of party autonomy is such that it should trump these 'public policy' considerations.[130] Freedom of contract is not easily denied, as is evidenced by the PRA itself, which allows parties to contract out of the principle of equal sharing.[131] Moreover, the freedom to select the applicable law is consistent with the 'personal' elements of the objective choice of law rule, which seeks to give effect to the parties' expectations.

[128] M Hook, *The Choice of Law Contract* (Hart Publishing, 2016) ch 3.
[129] *Ibid*, 58-62.
[130] Although the rule could recognise a residual role for the law that would have been applicable in the absence of agreement, by giving effect to that law's overriding public policies: Hook (*supra* n 128) ch 3.
[131] S 21.

This conclusion is subject to an important caveat, which is that the parties' power to choose the applicable law should be regulated so as to require a free, fair and informed agreement. These safeguards are necessary because personal relationships are prone to bounded rationality, uninformed decision-making and inequalities in bargaining power.[132] An appropriate starting point would be to require an agreement that is both express and in writing, and to provide that the parties should have been fully informed of the nature and the possible consequences of the agreement.[133] Thus, a mere assumption that a certain legal system would apply would not be sufficient to amount to a valid choice of law agreement, as is arguably the case at common law.[134] Instead, it would be a factor in determining the law with the closest connection.

4. *Implications for reform*

Applying first principles, this paper has made the case for an internationalist approach to New Zealand's conflict of laws rules on couples' property. Claims should be characterised as dealing with the property consequences of personal relationships. This characterisation emphasises the relationship, and not the property, so as to facilitate the effective dissolution of the personal property relationship. The relationship should be seen as a whole, within the exercise of universal subject-matter jurisdiction and governed by one applicable law. But courts should have a discretion to decline the exercise of jurisdiction, over the claim as a whole (on the basis that New Zealand is not the appropriate forum) or in relation to particular property (as currently provided for by s 7(3) of the PRA), where this is necessary to ensure the just resolution of the claim. The applicable law, in the absence of express agreement, should be the law with the closest and most real connection to the relationship, based on connections that emphasise its

[132] Hook (*supra* n 128) ch 7. This concern is also reflected in the PRA: ss 21F and s 21J.
[133] Hook (*supra* n 128) ch 7; cf Hague Maintenance Protocol (*supra* n 73) Art 8(5).
[134] *De Nicols v Curlier* [1900] AC 21 (HL); *Murakami v Wiryadi* [2010] NSWCA 7, (2010) 268 ALR 377, [118]-[121] should not be followed. Cf *Bergner v Nelis* HC Auckland CIV-2004-404-149, 19 December 2005, [24].

personal and social dimensions. Where the parties have expressly chosen the applicable law, safeguards should be in place to ensure the parties' free, fair and informed agreement.

Based on this proposal, it is clear that New Zealand's existing rules on couples' property are in need of reform. With the exception of section 7A, the rules are surprisingly inward-focused, disregarding the values we have just identified:

> (1) Section 7 isolates the court, and the parties, against the application of foreign law and confers a broad reach on the law of the forum. This means that the PRA may apply in some cases that have relatively limited connection to New Zealand.[135] The connecting factor of individual domicile, in particular, is very generous. A spouse may rely on the PRA to claim an interest in foreign movables on the basis that he or she is domiciled in New Zealand, even if the couple never lived together in New Zealand. For example, a New Zealander may have entered into a de facto relationship with a French person while living in France but may not have formed an intention to live in France indefinitely (and, hence, may not have relinquished his New Zealand domicile).[136] To apply the PRA to such a claim is to deny that the claim has a more meaningful connection to France than to New Zealand.
>
> It is true that the court's discretion to declare New Zealand forum (non) conveniens has a tempering effect on how far section 7 reaches in practice. Thus, if a relationship has minimal connection to New Zealand, the respondent spouse or partner would likely protest the court's jurisdiction or seek a stay of proceedings on the basis that it is not the appropriate forum to hear the claim.[137] In addition, the PRA itself offers a tool to moderate its scope, by empowering the court, in section 7(3), to decline to

[135] See, eg, *Kane v Ethell* [2006] NZFLR 421.
[136] On the meaning of domicile, see Domicile Act 1976 (NZ).
[137] High Court Rules, r 6.29 and r 15.1; eg *Kane v Ethell* [2006] NZFLR 421.

make an order in respect of foreign movables if the respondent is neither domiciled nor resident in New Zealand.

But neither of these mechanisms is a panacea. New Zealand may be the appropriate forum even though New Zealand law is not closely connected to the relationship (for example, where the couple recently moved to New Zealand, and New Zealand is the domicile of origin of only one of the parties). Ironically, the court may also treat the applicability of the PRA as a factor pointing *towards* New Zealand as the appropriate forum since the law applicable to the substance can be a strong factor in determining the appropriate forum.[138] Section 7(3), too, may be unavailable. The respondent may be domiciled or resident in New Zealand, in circumstances where another country is much more closely connected to the relationship; and the discretion is limited to foreign movables. The provision seems primarily concerned with the enforceability of orders over particular movables.

The PRA itself does not provide any clues that would help to explain the breadth of section 7. On the one hand, it is only natural that a unilateral choice of law rule should be accompanied by broad connecting factors. A restrictive approach may leave 'gaps' in the applicable law and unduly impede a claimant's access to justice. Section 7 avoids these risks by casting its net wide. In all other respects, it may simply be seen as a (unilateral) replication of the common law choice of law rules for movable and immovable property.[139] But this does not explain why New Zealand opted for a unilateral choice of law approach in the first place. For the reasons explored above, a multilateral choice of law rule provides a more principled solution.

[138] *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* [2010] NZCA 502, [135]; *Gilmore v Gilmore* [1993] NZFLR 561 (HC), 566.
[139] See McLachlan (*supra* n 14) 71.

(2) Section 7 also excludes consideration of the movable property of non-domiciliaries, and of foreign immovables. If there is residual subject-matter jurisdiction in relation to such property at common law, the claim will likely be governed by foreign law,[140] leading to the possible fragmentation of claims across New Zealand and foreign law. If there is no residual subject-matter jurisdiction, the parties may be denied access to the New Zealand court altogether, or the claim may be fragmented across two or more jurisdictions. These exclusions hinder the effective dissolution of the personal property relationship. As has been argued above, the focus of the rules should be on the effective coordination – rather than the exclusion – of subject-matter jurisdiction.

(3) Even section 7A(2), which allows for party choice and provides a counterpoint to the forum-centredness of section 7, is problematic, because it is unclear to what extent the parties' choice must comply with any rules of formal validity.[141] Section 7A(2)(b) contains the confusing requirement that the agreement 'is in writing or is otherwise valid according to the law of that country'. It is also unclear why the section requires couples to have entered into the choice of law agreement 'before or at the time of their [relationship]'.[142] This provision significantly reduces the practical availability of party choice, especially to parties in de facto relationships.

This inward focus of the existing rules may be the result of an overly categorical, closed approach to conflict of laws methodology. The principle of connection, when conceptualised as neutral and normatively self-sufficient, is easily displaced where claims raise questions of public policy. In this closed approach, 'close connection' and 'public policy' form a bright-

[140] A claim based on New Zealand law would likely be unavailable: see *supra* B3.
[141] Hook (*supra* n 128) ch 6, pt V.B.ii.
[142] See Law Commission (*supra* n 3) 793.

line binary. Hence, couples' property – as an area of public policy – readily triggers blanket exclusions of foreign law and jurisdiction.[143] But as we have now seen, modern conflict of laws methodology goes much beyond this binary, potentially hollow labelling that the discipline has at times been associated with:[144] an empty principle of connection, on the one hand, and public policy on the other. In allocating claims to legal systems, the conflict of laws provides a framework for negotiating differences across borders – a framework for relating to, and dealing with, 'the other'.[145] Upon careful evaluation, it is appropriate in principle that New Zealand courts may assume international jurisdiction and apply foreign law to claims arising from personal property relationships, subject to a public policy exception for matters that go right to the heart of New Zealand's most fundamental interests.

V. Conclusion

This paper has argued on the basis of first principles that New Zealand's conflict of laws rules for couples' property should adopt an internationalist approach. The Law Commission's inquiry into the PRA represents an exciting opportunity to refashion the rules accordingly. But the argument also raises interesting questions beyond the New Zealand context. In particular, it is possible that the proposed rules would be equally appropriate in other jurisdictions that have taken a forum-centred approach to couples' property, like England and Australia.[146] It is true that the substantive laws in these jurisdictions differ greatly from the PRA. But the analysis in D1 above suggests that a broad approach to characterisation, taking account of the functions of foreign laws, could still yield similar results. The proposed rules also raise questions for

[143] Cf, in relation to divorce, M Wolff, *Private International Law* (Clarendon Press, 2nd edn, 1950) 373-4.
[144] See, eg, H Muir Watt, 'Private International Law Beyond the Schism' (2011) 2 *Transnational Legal Theory* 347, 375-81 for a critical account of private international law's 'tunnel-vision'.
[145] See Schiff Berman 'Conflict of Laws and the Legal Negotiation of Difference' (*supra* n 48); H Muir Watt, 'Hospitality, Tolerance, and Exclusion in Legal Form: Private International Law and the Politics of Difference' (2017) 70 *Current Legal Problems* 111; Riles (*supra* n 51).
[146] Family matters that fall under the Matrimonial Causes Act 1973 (and the Matrimonial and Family Proceedings Act 1984) (England and Wales) and the Family Law Act 1975 (Aust), respectively, are largely governed by the law of the forum.

jurisdictions that, unlike New Zealand, *have* adopted multilateral choice of law rules for couples' property.[147] These jurisdictions have avoided an open-ended, evaluative connecting factor like the one suggested in this paper and, based on the analysis in D3(c) above, may have placed too much emphasis on the predictability of fixed connecting factors. It seems that New Zealand now has a unique opportunity to demonstrate the benefits of an internationalist approach to couples' property that makes full use of the pluralist potential of the conflict of laws.

[147] eg Swiss Code on Private International Law, Art 54.